Supreme Court, U.S.
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No. 031310

In The

Supreme Court of the United States

ANDRES ALDANA,

Petitioner,

v.

DOUGLAS DRETKE,
Director, Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether petitioner is entitled to a certificate of appealability to determine whether the state court decision that trial counsel was effective despite his failure to investigate the firearms evidence and consult with a firearms expert was contrary to or involved an unreasonable application of clearly established Supreme Court precedent.

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PETITION FOR A WRIT OF CERTIORARI

Andres Aldana respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The findings of fact and conclusions of law of the 292nd District Court of Dallas County are not reported (Appendix B). The order of the Texas Court of Criminal Appeals denying habeas corpus relief is not reported (Appendix C). The report of the United States Magistrate Judge denying relief is not reported (Appendix D). The order of the United States District Judge adopting that report is not reported (Appendix E). The order of the Fifth Circuit denying a certificate of appealability is not reported (Appendix A).

JURISDICTION

The Fifth Circuit denied a certificate of appealability on January 6, 2004. This petition is filed within 90 days of that decision. This Court has jurisdiction under 28 U.S.C. § 1254(1). Petitioner initially invoked federal jurisdiction under 28 U.S.C. § 2254.

CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the

accused shall enjoy . . . the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

A. Summary Of The Issue

The prosecutor persuaded the jury to reject self-defense with the aid of a detective's testimony that, in his opinion, the deceased's gun had not been fired recently because the spent cartridge was not under the hammer. Trial counsel failed to investigate the firearms evidence and consult with a firearms expert to determine the validity of that opinion. Petitioner presented uncontroverted evidence in the state habeas proceeding that the position of the spent cartridge in the cylinder was consistent with the deceased's gun having been fired recently, which rebutted the detective's testimony and supported self-defense. The state court decision that counsel was effective was contrary to or involved an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), as explicated in *Wiggins v. Smith*, ___ U.S. ___, 123 S.Ct. 2527 (2003).

B. Procedural History

Petitioner was indicted for murder. He pled not guilty in the 292nd District Court of Dallas County. The jury convicted him and assessed his punishment at 50 years in prison on December 10, 1997.

The Fifth Court of Appeals affirmed petitioner's conviction in an unpublished opinion issued on June 4, 1999. The Texas Court of Criminal Appeals refused discretionary

review on September 29, 1999. *Aldana v. State*, No. 05-98-135-CR (Tex. App. – Dallas 1999, pet. ref'd).

Petitioner filed a state habeas corpus application in December of 2000. The district court, without a hearing, entered findings of fact and conclusions of law recommending that relief be denied (Appendix B). The Court of Criminal Appeals denied relief without written order on May 16, 2001. *Ex parte Aldana*, Writ No. 48,318-01 (Tex. Crim. App. 2001) (Appendix C).

Petitioner filed a federal habeas corpus petition in June of 2001. The magistrate judge denied relief on August 4, 2003 (Appendix D). The district court adopted that report on August 20, 2003, and denied a certificate of appealability on September 30, 2003 (Appendix E). A circuit judge of the Fifth Circuit denied a certificate of appealability on January 6, 2004 (Appendix A).

REASONS FOR GRANTING THE PETITION

PETITIONER IS ENTITLED TO A CERTIFICATE OF APPEALABILITY TO DETERMINE WHETHER THE STATE COURT DECISION THAT TRIAL COUNSEL WAS EFFECTIVE DESPITE HIS FAILURE TO INVESTIGATE THE FIREARMS EVIDENCE AND CONSULT WITH A FIREARMS EXPERT WAS CONTRARY TO OR INVOLVED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED SUPREME COURT PRECEDENT.

Martin Chavez, a security guard at a bar, escorted petitioner, a customer, to his truck after he grabbed a female employee. Chavez walked back towards the bar,

turned around in the street, and approached petitioner with his gun drawn. Petitioner retrieved a gun from his truck and fired once at Chavez, who fell to the ground with his gun in his hand. A sheriff's deputy working nearby as a security guard arrested petitioner. Chavez died as a result of a gunshot wound to the chest.

The police found Chavez's gun laying beside him; the trigger was not cocked. Detective Kenneth Vineyard opened the cylinder of the gun and observed five live rounds and one spent round; the spent cartridge was not under the hammer. The police did not look for a bullet fired from the gun. Detective Dan Trippell testified that, in his opinion, the gun had not been fired recently; otherwise, the spent cartridge would have been under the hammer. Larry Fletcher, a firearms examiner, agreed.

Petitioner testified that Chavez twice threatened to kill him before they parted company at his truck. Petitioner retrieved his gun and placed it on the seat. Chavez walked back towards the bar, turned around in the street, approached him with a drawn gun, and ignored his warning to stay back. When Chavez raised the gun, petitioner fired once, believing that Chavez was about to shoot him.

The court instructed the jury on self-defense. The prosecutor argued that the jury should reject that defense because, *inter alia*, Chavez's gun had not been fired recently, as the spent cartridge was to the right of the hammer. The jury convicted petitioner of murder and assessed his punishment at 50 years in prison.

Petitioner filed a state habeas corpus application alleging that trial counsel was ineffective in failing to investigate the firearms evidence and consult with a firearms expert. He presented compelling, uncontroverted

evidence in the state habeas proceeding that the position of the spent cartridge in the cylinder was consistent with Chavez's gun having been fired recently.

C.E. Anderson, who had been administrator of the Houston Police Department Crime Laboratory for 27 years, testified by affidavit that based on a photograph of the cylinder of Chavez's gun and the police description of how the cylinder was opened, he believed that the spent cartridge was under the hammer before the cylinder was opened and that the physical evidence was consistent with the gun having been fired recently. Brian Pearce, a firearms expert, conducted research to determine whether the spent cartridge in Chavez's gun could be in the position observed by Detective Trippell had the gun been fired recently. Pearce testified by affidavit that Chavez's gun could have been fired recently even if the spent cartridge was to the right of the hammer when the cylinder was opened, as the spent cartridge could have rotated backwards to that position had Chavez touched the cylinder as he fired the gun.

Trial counsel testified by affidavit that he did not investigate the firearms evidence or consult with a firearms expert concerning whether Chavez's gun had been fired recently. After the trial, he read an article in the November 1998 *Outdoor Life* magazine stating that the cylinder of this type of gun rotates backward upon firing, and he realized that could explain the position of the spent cartridge in Chavez's gun. Counsel's failure to investigate the firearms evidence and consult with a firearms expert was not strategic.

The police opinion testimony that Chavez's gun had not been fired recently, which the prosecutor emphasized

during summation, damaged petitioner's defense. Because counsel failed to conduct an adequate investigation, he was unprepared to cross-examine Trippell and Fletcher on this point and did not present independent rebuttal evidence. The testimony of Anderson and Pearce would have undermined the testimony of Trippell and Fletcher and would have precluded the prosecutor from effectively arguing that the position of the spent cartridge in the cylinder demonstrated that Chavez's gun had not been fired recently. Thus, counsel's failure to investigate the firearms evidence and consult with a firearms expert constituted deficient performance.

The state habeas court did not make any findings regarding whether counsel's failure to investigate the firearms evidence and consult with a firearms expert was deficient, whether it was based on reasonable trial strategy, and whether it affected the outcome of the trial. Instead, it summarily concluded that "counsel's representation did not fall below an objective standard of reasonableness under the prevailing professional norms that existed at the time of trial." Assuming *arguendo* that this finding addressed the merits of petitioner's contention, it was contrary to or involved an unreasonable application of *Strickland v. Washington, supra.*

This Court recently reaffirmed the principles of *Strickland* in *Wiggins v. Smith, supra.* The Maryland Court of Appeals and the Fourth Circuit had held that counsel's failure to discover and present mitigating evidence at the punishment stage of a capital murder trial was based on a reasonable trial strategy. This Court focused on whether the investigation supporting the decision not to present the mitigating evidence was itself reasonable. It held that a strategic choice made after an

inadequate investigation is unreasonable. The principle that emerges from *Wiggins* is that counsel cannot make a reasonable strategic decision not to present evidence that he did not discover as a result of an inadequate investigation.

The state court decision that counsel was effective despite his failure to investigate the firearms evidence and consult with a firearms expert was contrary to or involved an unreasonable application of *Strickland*, as explicated in *Wiggins*. The Fifth Circuit summarily denied a certificate of appealability without analyzing the state court decision to determine whether it followed Supreme Court precedent. Accordingly, this Court should grant certiorari, vacate the judgment, and remand to the Fifth Circuit with instructions to grant a certificate of appealability and consider the merits of the ineffective assistance of counsel issue.

CONCLUSION

Petitioner requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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Andres Aldana

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-10980
USDC No. 3:01-CV-1081-L

ANDRES ALDANA,

Petitioner-Appellant,

versus

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

ORDER:

(Filed Jan. 6, 2004)

Andres Aldana seeks a certification of appealability (COA) to appeal the denial of his 28 U.S.C. § 2254 petition, in which he challenged his murder conviction. He argues that he received ineffective assistance of counsel when counsel did not investigate the firearms evidence or obtain a firearms expert to rebut the State's contention that Aldana's victim did not fire his weapon.

Aldana, however, has not demonstrated "that reasonable jurists would find the district court's assessment of

the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). His motion for a COA is therefore DENIED.

/s/ Jerry E. Smith
Jerry E. Smith
UNITED STATES CIRCUIT JUDGE

APPENDIX B

WRIT NO. W96-48955-V(A)

EX PARTE	§	**IN THE 292ND JUDICIAL**
	§	
	§	**DISTRICT COURT**
ANDRES ALDANA	§	**DALLAS COUNTY, TEXAS**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having considered the allegations contained in Applicant's Application for Writ of Habeas Corpus, the Court makes the following Findings of Fact and Conclusions of Law:

CASE HISTORY

Applicant was convicted by a jury on a plea of not guilty of the offense of murder. Applicant was sentenced to fifty years confinement in the Texas Department of Criminal Justice, Institutional Division on December 10, 1997. After conviction an appeal was perfected. The case was affirmed in opinion number 05-98-00135-CR on June 4, 1992.

Applicant was represented at trial by the Honorable Donald Scoggins and on appeal by the Honorable James Volberding.

QUESTIONS RAISED IN APPLICATION

In his Application for Writ of Habeas Corpus, Applicant alleges he is entitled to relief for the following reason:

1. Applicant was denied the effective assistance of counsel at trial, in that:

   a. Counsel failed to consult with a firearms expert, and

   b. Counsel failed to object to a statement made by the prosecutor during closing argument.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Applicant claims that counsel's failure to consult with a firearms expert regarding the possibility that the victim's weapon had recently been fired renders him ineffective. To support his allegations, Applicant attaches an affidavit from trial counsel which states that counsel's failure to consult with a firearm expert was not strategic, and that, had such expert testimony been presented there is a reasonable probability that Applicant would be acquitted.

2. Applicant also claims that counsel was ineffective due to counsel's failure to object to a statement made by the prosecutor during closing argument. The prosecutor, Appellant alleges, made a statement regarding her personal belief with respect to Applicant's defensive theory. Counsel's affidavit attached to the application states that the failure to object was not strategic; it was the result of inattention.

3. Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), Applicant must show 1) that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and 2) that counsel's errors prejudiced the defense; the errors were so serious at [sic] to deprive Applicant of a fair trial. See also *Hernandez v. State*, 726 S.W.2d 53 (Tex. Crim. App. 1984), and *Sailor v. State*, 660 S.W.2d 822 (Tex. Crim.

App. 1983). In *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996), the Court of Criminal Appeals held that Applicant must show that but for counsel's errors the result of the trial would have been different in order to satisfy the second prong of the *Strickland* test. This does not mean Applicant is entitled to errorless counsel or counsel whose competency is judged by hindsight. Counsel's reasonableness must be evaluated from counsel's perspective at the time, and Applicant must rebut a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. This presumption must be rebutted by Applicant by proof that counsel's representation was unreasonable under prevailing professional norms that existed at the time, and that the challenged action was not sound trial strategy. *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S.Ct. 2574, 2588, 91 L.Ed.2d 305 (1986). *Strickland* also states that in assessing a claim of ineffective assistance a reviewing court need not address both prongs of the test if Applicant makes an insufficient showing on either prong. *Strickland*, 466 U.S. at 697.

4. Subsequent to the receipt of Applicant's Application for Writ of Habeas Corpus, this Court sent a copy of Applicant's Application to Applicant's trial counsel, the Honorable Donald Scoggins. This Court requested that Mr. Scoggins furnish this Court with any response to allegations in the Applicant's Application which Mr. Scoggins deemed to be appropriate. This Court has received an affidavit from Mr. Scoggins and is attaching said affidavit to this Court's Findings of Fact and Conclusions of Law as Exhibit 1.

5. The Court notes that while Mr. Scoggins affidavit submitted to the Court is similar to his affidavit provided with Applicant's application, it does not state that had the errors not been committed that there is a

reasonable probability that Applicant had been acquitted.

6. Based on a thorough review of the records in Applicant's case, the Court finds that counsel's representation did not fall below an objective standard of reasonableness under the prevailing professional norms that existed at the time of trial.

7. The Court finds that Applicant has not met his burden of proof to show that he did not receive effective assistance of counsel, as he is required to do so by law cited in Finding of Fact and Conclusion of Law 3.

8. Applicant has not been denied any rights guaranteed him by the Constitution of the United States of America or the Constitution of Texas.

9. Applicant has failed to sustain his burden of proof in regard to Applicant's allegation. *Ramirez v. State*, 916 S.W.2d 32 (Tex. App. – Houston [1st Dist.] 1995); *Ex parte Wagner*, 905 S.W.2d 799 (Tex. App. – Houston [14th Dist.] 1995); *Ex parte Barber*, 879 S.W.2d 889 (Tex. Crim. App. 1994); *Ex parte Salinas*, 660 S.W.2d 97 (Tex. Crim. App. 1983); *Tonjes v. State*, 627 S.W.2d 814 (Tex. Crim. App. 1982).

10. The Court finds that Applicant is lawfully restrained and confined by Respondent.

11. The Court is of the opinion that Applicant's Application for Writ of Habeas Corpus is without merit and the Court recommends that it be denied.

12. A hearing on this Application for Writ of Habeas Corpus is not necessary.

ORDERS OF THE COURT

In implementing the Court's Findings of Fact and Conclusions of Law, the Clerk will:

1. Prepare a transcript of all papers in this cause and transmit the Court's Order and the Findings of Fact and Conclusions of Law, including the judgment, sentence, indictment, docket sheets and other exhibits and evidentiary matter filed in the trial records of this cause of the Texas Court of Criminal Appeals as provided by the Tex. Code Crim. Proc. Ann. art. 11.07.

2. Send a copy of this Order and the Findings of Fact and Conclusions of Law to the Applicant and his counsel, if any, by depositing same in the U.S. Mail.

SIGNED and ENTERED this the ___ day of _____, 2001.

/s/ [Illegible]
Judge Henry Wade, Jr.
292nd Judicial District Court
Dallas County, Texas

EXHIBIT A

STATE OF TEXAS §
§ AFFIDAVIT OF
COUNTY OF DALLAS § DONALD R. SCOGGINS

My name is Donald R. Scoggins and I am a criminal defense attorney. My office is located at 1600 Pacific Avenue, Suite 2400, Dallas, Texas 75201. I represented Andres Aldana at his 1997 murder trial. In regard to Mr. Aldana's Article 11.07 Application for Writ of Habeas

Corpus, specifically Subject Index Item B, 1 it is true that I did not consult with a firearms expert regarding the position of the spent cartridge in the cylinder of the deceased's pistol. My failure to do so was not strategic, it simply never occurred to me that a revolver could rotate backwards after being fired.

Regarding Subject Index Item B, 2 my failure to object to the prosecutor's argument was not strategic. It was the result of inattention.

Donald R. Scoggins
DONALD R. SCOGGINS, Affiant

STATE OF TEXAS §
COUNTY OF DALLAS §

SWORN AND SUBSCRIBED before me by Donald R. Scoggins on the 25 day of January 2001.

(SEAL) DONNA BUSBY
COMMISSION EXPIRES
NOVEMBER 1, 2003

Notary Public, State of Texas

/s/ Donna Busby

APPENDIX C

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78211

(U.S. Postage Meter Stamped May 22, 2001)

RE: Writ No. 48,318-01
STYLE: Andres Aldana
TRIAL CT NO: W96-48955-V(A)
May 16, 2001

This is to advise that the Court has denied without written order the application for writ of habeas corpus.

(Received May 24, 2001)

RANDY SCHAFFER
1301 MCKINNEY
SUITE 3100
HOUSTON TX 77010

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

ANDRES ALDANA,	)	
Petitioner,	)	
v.	)	**No. 3:01-CV-1081-L**
JANIE COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division,	)	
Defendant.	)	

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

(Filed Aug. 4, 2003)

Pursuant to the provisions of 28 U.S.C. § 636(b) and an order of the District Court, this case has been referred to the United States Magistrate Judge. The findings, conclusions and recommendation of the Magistrate Judge follow:

Parties

Petitioner is an inmate in the custody of the Texas Department of Criminal Justice, Institutional Division (TDCJ-ID). Respondent is Janie Cockrell, Director of TDCJ-ID.

Procedural History

Petitioner challenges Respondent's custody of him pursuant to a state court judgment and fifty-year sentence in case number F-96-48955-SV. Petitioner was sentenced on December 10, 1997. The Fifth District Court of Appeals of Texas affirmed the conviction in an unpublished opinion issued on June 4, 1999. *See Aldana v. State,* No. 05-98-00135-CR, 1999 WL 357355 (Tex. App. – Dallas, 1999, pet. ref'd). The Texas Court of Criminal Appeals refused discretionary review on September 29, 1999. *See Aldana v. State,* No. 1125-99.

Petitioner filed a state habeas corpus petition on December 4, 2000. *Ex Parte Aldana,* Application No. 48,318-01 (Tex. Crim. App. 2000). The Texas Court of Criminal Appeals denied relief without written order on May 16, 2001. *Id.* at Cover. Petitioner filed his federal habeas corpus petition on June 7, 2001. Respondent answered the petition on December 3, 2001.

Exhaustion of State Court Remedies

Petitioner has exhausted his state court remedies.

Issues

Petitioner raises the following claims:

Counsel provided constitutionally ineffective assistance in the following particulars:

1. He failed to hire an expert to examine the victim's weapon to see if it had been fired during the murder;

2. He failed to object to a statement by the prosecutor in closing argument.

Standard of Review

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The pertinent terms of the AEDPA provide:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in a State court proceeding.

28 U.S.C.A. § 2254(d).

The AEDPA applies to all federal habeas corpus petitions which were filed after April 24, 1996, provided that they were adjudicated on the merits in state court. *Lindh v. Murphy,* 521 U.S. 320, 326 (1997). Resolution on the merits in the habeas corpus context is a term of art that refers to the state court's disposition of the case on substantive rather than procedural grounds. *Green v. Johnson,* 116 F.3d 1115, 1121 (5th Cir. 1997). Petitioner's state habeas application was denied on the merits.

Under the "contrary to" clause of the AEDPA, a federal habeas court may grant a writ of habeas corpus if

the state court arrives at a conclusion opposite to that reached by the United States Supreme Court on a question of law. *Williams v. Taylor,* 529 U.S. 362, 412 (2000). A writ may also be granted if the state court decides a case differently from the United States Supreme Court on a set of materially indistinguishable facts. *Id.* Under the "unreasonable application" clause of the AEDPA, a federal court may grant a writ of habeas corpus if the state court identifies the correct governing legal principle from the United States Supreme Court's decisions, but unreasonably applies that principle to the facts of the prisoner's case. *Id.* Federal habeas corpus review encompasses errors of constitutional magnitude, and habeas corpus relief may not be based upon errors of state law. 28 U.S.C. § 2254(a);[1] *Estelle v. McGuire,* 502 U.S. 62, 67 (1991). Clearly established federal law "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Id.* A claim of ineffective assistance of counsel is a mixed question of law and fact and should be reviewed under the "contrary to" and "unreasonable application" prong of 28 U.S.C. § 2254(d). *Valdez v. Cockrell,* 274 F.3d 941, 946 (5th Cir. 2001) (citing *Clark v. Johnson,* 202 F.3d 760, 764 (5th Cir. 2000); *Nobles v. Johnson,* 127 F.3d 409, 415 (5th Cir. 1997)).

---

[1] The terms of 28 U.S.C. § 2254(a) provide that a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Statement of Facts

Claudia Machi testified she tended bar at El Palenque Lounge in Dallas. On August 3, 1996, [Petitioner] came into the bar and, at first, sat alone. Late in the evening, one of the bar's waitresses, Esmerelda, sat down with [Petitioner] and had drinks. Another waitress approached [Petitioner,] asked him to buy her a drink, and he complied. Esmerelda moved to another table to have drinks with other patrons. [Petitioner] went to where Esmerelda was sitting, grabbed her by the arm, and told her he wanted her to return to his table. Martin Chavez, the bar's armed security guard, intervened and told [Petitioner] to "take it easy." [Petitioner] told Chavez to leave him alone, and Chavez escorted [Petitioner] out of the bar. Machi testified that she had never seen Chavez ask a customer to leave prior to the night in question. When Chavez escorted [Petitioner] out of the bar, [Petitioner] did not struggle or resist. Machi testified that Chavez had not been drinking that night.

Tommy Greer and his wife, Sylvia, went to El Palenque bar that night to visit Greer's uncle, Henry Martinez, who managed the club. The three were standing outside the bar talking just after midnight when they noticed Chavez escorting [Petitioner] out of the bar. Chavez led [Petitioner] across the street to a parked truck, where the two appeared to be talking. According to the Greers and Martinez, the men were not shouting at one another and it did not appear that they were fighting. About twenty seconds later, Chavez began walking back across the street to the bar. While Chavez was crossing the street, [Petitioner] opened the door to his truck, lifted the seat, and appeared to be looking for something.

Chavez turned around and noticed [Petitioner] reaching behind his seat. Chavez then began to recross the street, and [Petitioner] pulled a gun from his truck and pointed it at Chavez. Chavez removed his weapon from his holster. At this point, Greer pushed his wife behind a truck for protection, and Martinez went to a nearby restaurant for help. Greer testified that Chavez and [Petitioner] were about ten feet apart when [Petitioner] fired his gun. The bullet hit Chavez in the chest. [Petitioner] went to his truck and got in. A sheriff's deputy, who had been summoned by Martinez, ran up to [Petitioner] with his gun pulled and ordered [Petitioner] out of the truck. [Petitioner] complied. Each witness testified [Petitioner] was the first to pull his gun. The witnesses said they heard only one shot.

Sheriff's deputy Paul Reyna was working part-time security at a restaurant near the El Palenque Lounge on August 3, 1996 when he received a report that a man was outside with a gun. As soon as Reyna walked outside, he saw [Petitioner] pointing a gun at someone else. Before Reyna could draw his gun, [Petitioner] fired a shot. [Petitioner] then got in his truck and apparently was preparing to leave. Reyna went to the truck, pulled open the door, and pulled [Petitioner] out. [Petitioner] initially resisted "but it wasn't a big struggle." Reyna handcuffed [Petitioner] and put him on the ground.

Within minutes, the police and emergency personnel arrived at the scene. Police officer Jimmy Willhoite testified that he was first to arrive and saw Chavez's weapon lying on the ground and picked it up. The weapon "wasn't warm," leading Willhoite to conclude that it had not been fired. Detective Dan Trippel said he inspected the

weapon after its cylinder was opened and likewise concluded Chavez's gun had not been fired. [Petitioner's] gun was found on the front seat of his truck. The police did not recover the bullet that struck Chavez.

Dr. Sheila Spotswood, a medical examiner for Dallas County, testified the bullet entered Chavez's right chest area, passed through the heart and lungs, and exited his back. Damage to the heart was extensive, and Spotswood said a person could not "live long" with such an injury. No alcohol or drugs were found in Chavez's body, except for Atrophine, a drug typically used in resuscitation attempts.

[Petitioner] took the stand in his defense. He did not deny shooting Chavez, but said it was in self-defense. He testified he was having drinks at El Palenque with Esmerelda when she got upset because he bought a drink for another woman. [Petitioner] went to Esmerelda's table, put his hand on her shoulder, and asked her to come sit with him. At that point, Chavez approached [Petitioner] and told him to leave. [Petitioner] asked why, and Chavez put his hands on [Petitioner], "grabbing" him "all the way outside the place." [Petitioner] told Chavez to remove his hands. As they were walking to [Petitioner]'s truck, [Petitioner] said Chavez was "talking very loudly . . . with strong words." According to [Petitioner], Chavez told [Petitioner] that if he had a gun "take it out because I'm going to kill you." After [Petitioner] got to his truck and was reaching for his keys, he said Chavez repeated the threat three more times. [Petitioner] said he told Chavez that he did not have a gun. Chavez turned and walked back across the street. At that

point, [Petitioner] said he pulled a gun from behind the seat of his truck. [Petitioner] then noticed Chavez coming back across the street toward him. Chavez was "rubbing" his gun, and [Petitioner] told Chavez to go back. Chavez refused, and as Chavez reached the middle of the street, [Petitioner] pointed his gun at Chavez "because [Chavez] had his gun and was pulling it out." [Petitioner] said Chavez was "trying to cover himself with a car on his side" and [Petitioner] shot him "because if I wouldn't shoot him, he would shoot me."

On cross-examination, [Petitioner] denied he was angry that Esmerelda left his table after he had been buying her beer for several hours and said he was "calm" when Chavez first approached him. Later, he acknowledged he was a "little angry" but that he did not want to go back to the bar because Chavez said "strong words" to him. Further, he acknowledged that in his statement to the police on the night of the shooting, [Petitioner] said he pulled his gun and Chavez then walked toward him with his gun. Also in his defense, [Petitioner] presented three witnesses, who all testified that, in their opinion, [Petitioner] was a peaceful and law-abiding citizen. On cross-examination, these witnesses testified they did not know [Petitioner] carried a gun.

In rebuttal, the State offered [Petitioner's] written statement to the police. In his statement, [Petitioner] stated he pulled his gun after Chavez started back across the street to the bar. He continued:

> "I told him I was leaving. He then walked back towards me with his gun in his hand. I told him that I did not

> want to shoot him, that I was just leaving. He did not want to leave and kept pointing at me with the gun. At this time I did not know if he was going to shoot me because I kept pointing – because he kept pointing the gun at me. That is when I fired at him."
>
> After hearing all of the evidence, the jury convicted [Petitioner] of murder.

Aldana, 1999 WL 357355 at *1-3.

Ineffective Assistance of Counsel

In all criminal prosecutions, the accused has the right to the assistance of counsel for his defense. U.S. CONST., art. VI. To merit relief pursuant to § 2254 on a claim of ineffective assistance of counsel, a petitioner must demonstrate that his trial counsel's performance fell below an objective standard of reasonableness and that this deficient performance prejudiced his defense. *Strickland v. Washington,* 466 U.S. 668, 691 (1984). In assessing whether a particular counsel's performance was constitutionally deficient, courts indulge a strong presumption that counsel's conduct falls within the wide range of reasonable assistance, or that under the circumstances the challenged action might be considered sound trial strategy. *Strickland,* 466 U.S. at 689.

A petitioner's failure to establish either prong of the *Strickland* test requires the court to find that counsel's performance was not constitutionally ineffective. Therefore, courts are free to review ineffective assistance claims in any order and need not address both the "deficient" and "prejudice" prong if one component is found lacking.

Strickland, 466 U.S. at 697. The prejudice prong of *Strickland* requires the petitioner to show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland,* 466 U.S. at 694.

A determination of the factual issues made by the state court shall be presumed to be correct. Petitioner has the burden to rebut the presumption by clear and convincing evidence. Further, this Court reviews whether the state courts' decisions are an unreasonable application of *Strickland.* Petitioner claims that the state court's finding should not be given any deference. Petitioner further states that since the state court used boiler-plate language, it was the same as giving no finding at all, and suggests that this Court may consider the issue *de novo.* Petitioner's argument is not well-taken. The state thoroughly reviewed all issues presented to it by Petitioner. *See Ex parte Aldana,* Supp. Fin. at 4. Petitioner has failed to rebut the state court findings by clear and convincing evidence. Accordingly, this Court affords them the deference they are due.

Failure to Hire a Firearm Expert

Petitioner alleges that counsel provided ineffective assistance by failing to conduct an independent investigation of whether the victim's weapon had been fired. Petitioner alleges that counsel's having Chavez's firearm examined by a weapon expert could have provided exculpatory evidence. He further claims the exculpatory evidence would have convinced the jury that he was not the aggressor.

Petitioner's testimony was that Chavez "had his gun up" when Petitioner fired; he stated that if he did not shoot Chavez, Chavez would have shot him. (Record, Dec. 9, 1997, at 286.) Petitioner said that when he fired, the victim ducked and Petitioner did not see him again. (*Id.* at 287.) Petitioner did not testify that Chavez fired at him. Moreover, other witnesses testified that the victim's weapon had not been fired. (*Id.* at 269.) Judicial scrutiny of counsel's performance must be highly deferential; the court must make every effort to eliminate the distorting effects of hindsight and evaluate the conduct from counsel's perspective at the time. *Strickland,* 466 U.S. at 689. It is not enough to show that some, or even most, defense lawyers would have handled the case differently. *Strickland,* 466 U.S. at 689. Counsel's actions are usually based, quite properly, on information supplied by the defendant. *Strickland,* 466 U.S. at 691. Whether an investigation decision is reasonable depends critically on such information. *Strickland,* 466 U.S. at 691. The Court assumes that what Petitioner told counsel before trial is consistent with his trial testimony. Counsel had no reason to investigate whether Chavez fired his weapon. Additionally, the statements taken from eyewitnesses to the murder would give counsel no reason to investigate this "two simultaneous shots" theory.

Petitioner further alleges that had it been a police officer who fired in a similar situation, the grand jury would not have even indicted the officer. This is pure speculation. In fact, the Court finds this argument is frivolous and made in bad faith.

Under Texas law, self-defense is not available to a defendant who provokes the use of deadly force. TEXAS

PENAL CODE ANN. § 9.31(b)(4). Henry Martinez, the manager of the bar, testified that he saw Chavez turn around and noticed Petitioner reaching behind the seat in his car. Chavez then began to recross the street. Petitioner pulled a gun from his truck and pointed it at Chavez. (Record, Dec. 9, 1997, at 172-175.) Whether Chavez discharged his weapon to defend himself is not the relevant question. The question is who provoked whom before the fatal show [sic] was fired. There is no evidence that Petitioner was ever in fear of his life as a result of Chavez's being the aggressor. Chavez did not even loosen his holster so that he could get his weapon until he saw Petitioner's weapon. (Record, Dec. 8, 1997, at 183; Dec. 9, 1997, at 175, 180.) Moreover, witnesses testified they heard only one shot. (Record, Dec. 8, 1997 at 89, 108, 126; Dec. 9, 1997 at 183.) The Deputy Sheriff testified that he saw a muzzle flash coming from Petitioner's weapon and heard the gunshot from the direction of Petitioner's weapon. (Record, Dec. 9, 1997, at 194.) He was experienced in weapons and could tell when one weapon is fired as opposed to two. (*Id.*) He testified that the one shot came from Petitioner's weapon and that he did not hear a shot from where Chavez would have been standing. (*Id.* at 194-95.) A detective with the Dallas Police Department testified that officers thoroughly searched the area in question and found no spent shell that could have come from Chavez's weapon. (*Id.* at 269.) In his opinion, Chavez's weapon had not been fired. (*Id.*) Petitioner's claim that (1) two shots could have been fired simultaneously and (2) if counsel had investigated this possibility, it would have changed the outcome of the trial is not supported by the record. Petitioner cannot show that he was prejudiced by counsel's failure to hire an investigator to determine whether the victim's weapon had been fired during the murder. The state courts' determinations that

habeas relief is not warranted on this ground are not unreasonable applications of *Strickland*.

Counsel's Failure to Object During Closing Argument

Petitioner claims that trial counsel provided ineffective assistance by failing to object to a remark by the prosecutor during closing argument. The prosecutor stated:

> We talked about self-defense itself but this was not a complicated legal concept. It was something we could all understand. We talked about the fact that little bitty kids know sticks and stones don't break my bones. We talked about that. Little children know that. We may not like what people say to us and it may hurt, we may be wounded, we may carry inside scars forever but we don't pick up a weapon and blow somebody away because we don't like what they said. You don't pick up and go digging for a weapon because someone threatened you. I'm not quite sure that is what happened. I don't believe that's what happened.

(Record, Closing Arguments at 368.) Petitioner argues that the last comment was the prosecutor's personal opinion that Petitioner was not credible. Petitioner argues that if counsel had objected, Petitioner would have been acquitted or the case would have been reversed on appeal.

When a defendant contends a prosecutor's remark rendered his trial fundamentally unfair, the Court must examine the remark in context. *Darden v. Wainwright,* 477 U.S. 168, 179 (1986). *See Donnelly v. DeChristoforo,* 416 U.S. 637, 639 (1974). The petitioner must first show the

conduct in question was a crucial, critical, highly significant factor in the trial. *Lowery v. Estelle,* 696 F.2d 333, 342 (5th Cir. 1983). Then he must establish that the evidence presented at the trial was so insubstantial that, but for the challenged conduct or remark, he would not have been convicted. *See Feld v. Blackburn,* 795 F.2d 400, 403 (5th Cir. 1986).

A prosecutor may argue her opinions concerning issues in the case provided the opinions are based on the evidence in the record and do not constitute unsworn testimony. *McKay v. State,* 707 S.W.2d 23, 37 (Tex. Crim App. 1985). Petitioner has not shown that the remark in question was highly significant. Additionally, after reviewing the record, this Court notes that the evidence of Petitioner's guilt was substantial. The Court finds that the prosecutor's statement did not taint the trial. Counsel's failure to raise a meritless objection is not ineffectiveness of counsel; it is the very opposite. *See Clark v. Collins,* 19 F.3d 959, 966 (5th Cir. 1994). Counsel did not provide ineffective assistance by failing to object during the prosecutor's closing argument. The state court's refusal to grant habeas corpus relief on this ground was not an unreasonable application of *Strickland.*

Conclusion

The trial court, applying the *Strickland* standard, found that counsel's representation did not fall below an objective standard of reasonableness under the prevailing professional norms that existed at the time of the trial. *Ex parte Aldana,* Supp. Fin. at 4. The Texas Court of Criminal Appeals denied habeas corpus relief. *Ex parte* Aldana at Cover. After reviewing the record, this Court finds that the

state court proceedings in this case did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. Moreover, the state courts' decisions were not based upon an unreasonable determination of the facts in light of the evidence presented in state court. 28 U.S.C.A. § 2254(d).

RECOMMENDATION

The Court recommends that the petition for writ of habeas corpus be DENIED.

Signed this 4 day of August, 2003.

/s/ Paul D. Stickney
PAUL D. STICKNEY
UNITED STATES
MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

The United States District Clerk shall serve a copy of these findings, conclusions and recommendation on the parties. Pursuant to Title 28, United States Code, Section 636(b)(1), any party who desires to object to these findings, conclusions and recommendation must serve and file written objections within ten days after being served with a copy. A party filing objections must specifically identify those findings, conclusions or recommendation to which objections are being made. The District Court need not consider frivolous, conclusory or general objections. A party's failure to file such written objections to these proposed findings, conclusions and recommendation shall bar that party from a *de novo* determination by the

District Court. *See Thomas v. Arn,* 474 U.S. 140, 150 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions and recommendation within ten days after being served with a copy shall bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court, except upon grounds of plain error. *Douglass v. United Services Auto. Ass'n,* 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc).

/s/ Paul D. Stickney
PAUL D. STICKNEY
UNITED STATES
MAGISTRATE JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ANDRES ALDANA, Petitioner,	§	
v.	§	Civil Action No.
JANIE COCKRELL, Director, Texas, Department of Criminal Justice, Institutional Division, Respondent.	§	3:01-CV-1081-L

ORDER

(Filed Aug. 20, 2003)

After making an independent review of the pleadings, files and records in this case, and the findings, conclusions and recommendation of the United States Magistrate Judge, filed on August 4, 2003, the court determines that the findings and conclusions of the United States Magistrate Judge are correct. The findings and conclusions of the United States Magistrate Judge are hereby accepted as those of the court. Petitioner's objections are overruled. Petitioner's Writ of Habeas Corpus is **denied**, and this action is **dismissed** with prejudice.

It is so ordered this 20th day of August, 2003.

/s/ Sam A. Lindsay
Sam A. Lindsay
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ANDRES ALDANA,	§	
	§	
Petitioner,	§	
	§	
v.	§	Civil Action No.
JANIE COCKRELL, Director,	§	3:01-CV-1081-L
Texas, Department of Criminal	§	
Justice, Institutional Division,	§	
	§	
Respondent.	§	

JUDGMENT

(Filed Aug. 20, 2003)

This judgment is issued pursuant to the court's order and findings dated August 20, 2003.

It is therefore ORDERED, ADJUDGED, and DECREED that this action is DISMISSED with prejudice.

It is further ORDERED that the clerk shall transmit a copy of this judgment and a copy of the court's order of August 20, 2003, accepting the Findings, Conclusions and Recommendation of the United States Magistrate Judge to Petitioner and Respondent.

Signed this 20th day of August, 2003.

/s/ Sam A. Lindsay
Sam A. Lindsay
United States District Judge